No. 12,659

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD D. COFFEY,
Appellant,

vs.

ANTONIO POLIMENI,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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I.

STATEMENT RELATING TO PLEADING AND JURISDICTION.

This is an appeal from a final judgment rendered April 27, 1950, by the District Court for the Territory of Alaska, Third Division, in favor of appellee, Antonio Polimeni, and against appellant, Edward D. Coffey, in the sum of $9,200.00, costs, and attorneys' fees (R 57-58).

The District Court for the Territory of Alaska is a Court of General Jurisdiction consisting of four divisions of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48

U.S.C. Sec. 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1.

Jurisdiction of this Court to reveiw the judgment of the District Court is conferred by New Title 28 U.S.C., Sections 1291 and 1294.

Appellee, as plaintiff in the District Court, by his complaint alleged two causes of action. The first was for the sum of $10,000 for damages alleged to have resulted to plaintiff by reason of claimed negligence by appellant in failing to secure certain insurance which appellee claimed appellant had undertaken to procure for appellee (R 2-4). The second cause of action realleged by reference the first four paragraphs of the first cause of action and in brief claimed the sum of $10,000 as damages in favor of appellee by reason of claimed breach of contract by appellant to insure the property in question (R 4-6). At the beginning of the trial and by leave of the Court appellee amended his complaint to allege the date of the fire as July 20, 1948, instead of July 9, 1948, as originally alleged (R 25). Later the Court allowed plaintiff to amend his complaint to exclude two auxiliary buildings from the claimed loss (R 29-30). Both amendments were made by interlineation, and the complaint as it appears in the record is the complaint as amended, not the complaint as it was originally filed.

Answer filed by appellant as to the first cause of action of appellee's complaint denied any undertaking by appellant to secure insurance for appellant, denied negligence by appellant, and denied that appellee's claimed loss was due to any negligence of appellee (R

7-10). As to appellee's second cause of action, such answer denied any agreement to procure insurance for appellee (R 10-12). By affirmative defense appellant alleged that the entire negotiation between appellee and appellant concerning proposed insurance for appellee was had by correspondence and sets forth such correspondence as exhibits numbered 1 through 9, both numbers inclusive, and alleges that there was no meeting of the minds of the parties, and no contract, and that appellant was not responsible to appellee for appellee's alleged loss (R 12-13). Exhibits numbered 1 through 9, above mentioned, were admitted as plaintiff's exhibits numbered 1 through 9 and are found at pages 166 through 175 of the record, except as to a printed form which is part of Exhibit No. 2 and which was admitted as defendant's Exhibit "B" and is found at pages 274 and 275 of the record. Plaintiff's exhibits also appear as follows: 1 (R 247), 2 (R 248-249), 3 (R 249-251), 4 (R 253), 5 (R 254), 6 (R 255-256), 7 (R 257), 8 (R 258), 9 (R 258-259), when they were read to the jury.

Appellee, as plaintiff replied to the affirmative matter in defendant's answer, admitting that exhibits one through nine attached to such answer represented correspondence between plaintiff and defendant, but for lack of sufficient information to form a belief denied that such exhibits constituted the entire correspondence between the parties as alleged in paragraph I of such affirmative defense. The reply denied the allegations of the second paragraph of the affirmative defense (R 16).

Jury trial of the matter was had. At the close of plaintiff's case, defendant moved for judgment on the ground that the evidence was insufficient to justify any judgment in favor of plaintiff and against defendant. At that time the Court held there was no contract between the parties (R 244;31), but that he would submit the matter to the jury upon the theory of negligence of the defendant in failing to procure insurance. After further argument on behalf of the defendant, based on the ground that there was no evidence of any duty owed to the plaintiff by the defendant and therefore there was nothing to go to the jury, the Court denied defendant's motion for dismissal.

Thereupon, defendant introduced testimony and at the close of all the evidence renewed his motion for dismissal, or in the alternative, for a directed verdict on behalf of the defendant. This motion was denied (R 35) and the matter was submitted to the jury on the theory of negligent breach of a duty by the defendant to procure insurance (Instruction of the court No. 2; R. 44). Verdict was for the plaintiff in the amount of $9,200 (R 55). Judgment was rendered for the plaintiff and against the defendant as previously set forth.

Thereupon, on the first day of May, 1950, and within the period of time allowed by law and by the Federal Rules of Civil Procedure, defendant moved to set aside the verdict and the judgment and for judgment in favor of the defendant, or in the alternative, for a new trial (R 59-62). Both of these motions were de-

nied (R 65-66). Thereupon, this appeal was taken by defendant as appellant (R 66).

Appellee has taken no appeal from the judgment or any part thereof.

II.

STATEMENT OF THE CASE.

Plaintiff, Antonio Polimeni, at all times here in question resided at South Naknek, Alaska. At the same time defendant, Edward D. Coffey, resided at Anchorage, Alaska, and at all times here in question was admittedly an insurance agent and broker with offices at Anchorage.

Plaintiff Polimeni claims certain real property at South Naknek, Alaska, which in the spring and early summer of 1948 included a main building and two auxiliary buildings. The main building was a story-and-a-half of frame construction (R 73). This property was occupied by plaintiff prior to 1948. Just how he got it is in dispute. Whether he owned it is not clear (see Testimony of Witnesses, Smith R 92-97, 316-317; Polimeni, R 221, 307; Cuddy, R 312). In any event, after taking possession of the property, Polimeni did some work in repairing and remodeling the building upon the property and furnished certain labor and materials in such work. How much work was done and the cost of labor and materials doesn't appear, except as to deepening the well, which according to the testimony may have cost as much as $300.00

(R 121). In any event, plaintiff opened a small restaurant on the property about March of 1948. At that time he had certain equipment and merchandise on the premises. The amount and value of that equipment and merchandise and supplies likewise is not clear from the record.

The facts concerning the relations between plaintiff and defendant as to insuring this property are not in dispute. The entire transaction between the parties was had by mail between South Naknek, Alaska, and Anchorage, Alaska, or vice versa, or by telegraph between the same points. Either the originals or proved copies of all of such letters and wires are before the Court as plaintiff's exhibits numbered one through nine and defendant's Exhibit "B".

Usual time for delivery of mail between South Naknek, Alaska, and Anchorage, Alaska, has not been directly proved but as will be seen from the record (R 247-258) it averaged about six to seven days during the period in question.

On March 30 of 1948 plaintiff wrote defendant from South Naknek, Alaska, inquiring concerning insurance on the property above mentioned and the equipment, stock, and supplies. This letter is plaintiff's Exhibit 1, set out at page 166 of the record. This letter was received at defendant's office on April 6, 1948 (R 247). To that inquiry defendant replied on April 9, 1948, quoting a rate for insurance and asking further information (Plaintiff's Exhibit 2, R 167) and enclosing a form (Defendant's Exhibit "B", R 273-274-275). Just when Mr. Polimeni received this

letter is not clear but in any event he answered it in part on April 17, 1948 (Plaintiff's Exhibit 3, R 168). This letter was received by defendant's office on April 24, 1948, but was mislaid until about July 23, 1948, and not answered until that date. Meanwhile, on June 1, 1948, plaintiff wrote defendant to learn what had happened to his application (Plaintiff's Exhibit 4, R 170-171), and defendant replied on June 4, 1948, to the effect he presumed his letter of April 9 had been lost and quoted that letter in full (Plaintiff's Exhibit 5, R 171-172). This letter was received by plaintiff about the middle of June, 1948, or a little sooner (R 238). Plaintiff didn't answer that letter. Neither did he answer the letter from defendant dated July 23 (Plaintiff's Exhibit 6, R 172).

The building described as the main building burned sometime in July, 1948. The date is not clear but is alleged to be July 20, 1948. No one who had actual knowledge of the time or the manner of the fire testified at the trial. Several witnesses testified that they knew the main building burned as they later saw the ashes.

Apparently, neither of the auxiliary buildings burned (Amended Complaint, First Cause of Action VII, Second Cause of Action V).

Plaintiff had left the vicinity a month to six weeks before the fire, leaving the place in the charge of witness Ruhl (R 128). Ruhl, in turn, left the place sometime before the fire and it was vacant at the time of the fire (R 228).

The matter was tried on the theory that in any event there must have been an agreement on the part of defendant to procure insurance for plaintiff before there would be liability of defendant to plaintiff whether the liability should arise as a result of negligence of defendant or as a breach of agreement by defendant. See Complaint, first cause of action, paragraphs III, V, and X (R 2, 3 and 4) and second cause of action, paragraphs I and II (R 4-5). See also comments of the Court concerning liability of defendant (R 144 near the bottom of the page and R 145 at the top of the page) and notice plaintiff's requested instruction number 1 (R 40).

The Court, as has previously been set out, specifically found that no agreement had been reached by the parties (R 31).

The defendant in the lower Court took the position that no agreement had been reached between the parties and that no liability existed from defendant to plaintiff, whether the action was based on a theory of damage resulting from alleged negligence or on alleged breach of contract, and further that in any event plaintiff knew more than a month before the fire that defendant had not procured insurance, and that any loss suffered by plaintiff was the result of his own actions. See answer, particularly affirmative defense (R 12, 13), various motions made for judgment or directed verdict or judgment for defendant (R 30, 32, 35, 59, 60-62, 244, 317), defendant's requested instructions to the jury (R 37-40).

III.

QUESTIONS INVOLVED.

1. Can defendant be held liable to plaintiff for damages allegedly suffered by plaintiff in the absence of a promise or agreement made by defendant to procure insurance for plaintiff?

2. Was defendant under any duty to act upon plaintiff's letter dated April 17, 1948?

3. Is defendant liable to plaintiff in this action even though it be assumed that defendant's employees were negligent in losing or mislaying plaintiff's letter dated April 17, 1948?

4. Was plaintiff's alleged loss the proximate result of the loss or misplacing of plaintiff's letter dated April 17, 1948, by defendant's employees?

5. Is plaintiff entitled to attempt to hold defendant liable for plaintiff's alleged loss on a theory of damage by negligence where it affirmatively appears that plaintiff knew more than a month prior to the alleged loss that defendant had not procured insurance for plaintiff and would not attempt to procure such insurance without further information from plaintiff?

6. On the record presented, is there any substantial evidence to support a judgment in favor of plaintiff and against defendant in the amount of $9,200.

IV.

SPECIFICATIONS OF ERROR.

Appellant respectfully submits that the trial Court erred, and that each of such errors were substantial, and the results of those errors were prejudicial to defendant as follows:

1. That the trial Court erred in denying defendant's motion for judgment or for directed verdict in favor of defendant or for dismissal of the action as made at the close of plaintiff's case.

2. That the trial Court erred in denying defendant's motions made at the close of plaintiff's case as renewed at the close of all the evidence.

3. That the trial Court erred in submitting the matter to the jury at all.

4. That the trial Court erred in accepting the verdict of the jury.

5. That the trial Court erred in entering judgment in favor of plaintiff and against defendant in the amount of the verdict or at all.

6. That the trial Court erred in denying motion made by defendant to set aside the verdict and the judgment and in refusing to enter judgment in favor of defendant, notwithstanding the verdict.

7. That the trial Court erred in refusing to grant a new trial to the defendant.

V.

SUMMARY OF ARGUMENT.

1. Liability for alleged negligence presupposes a legal duty by one party to the other. This legal duty may arise by specific or implied agreement between the parties or by operation of law.

2. Defendant never at any time expressly or impliedly agreed to procure insurance for plaintiff as to the property concerned in this action.

3. Plaintiff's letter of April 17, 1948, was, at best, an application or proposal for defendant to secure certain insurance, and defendant was under no legal duty, either by specific or implied agreement or by operation of law, to accept or reject such application or to take any action upon it at all.

4. Since defendant was under no duty to accept or reject plaintiff's application or proposal for defendant to secure insurance for plaintiff, it becomes immaterial as to what defendant's employees did in connection with such proposal, and whether or not defendant's employees were negligent in handling such application or proposal is of no consequence in determining defendant's liability to plaintiff.

5. On the face of the record presented, plaintiff had ample time to procure or to attempt to procure insurance after he knew defendant did not intend to go further in the matter without additional information, and failed to act on the information he had either by furnishing the information requested by defendant or seeking insurance elsewhere. Accordingly, plaintiff is

in no position to blame his alleged loss on defendant or to claim damages of defendant.

6. Assuming for the purpose of argument, but for that purpose only, that there is liability of defendant to plaintiff, the record contains no substantial evidence to show the amount of plaintiff's loss or to support the verdict and the judgment following the verdict.

VI.

ARGUMENT.

At the outset appellant will concede that there is a line of cases holding insurance agents and brokers liable to applicants for insurance for negligent failure by the broker or agent to perform an agreement to procure insurance for the applicant or for negligence in performing an agreement to procure insurance. See 18 A.L.R. 1210 where it is said:

> "It may be laid down as a general rule, that a broker or agent who, with a view to compensation for his services, *undertakes* (emphasis mine) to procure insurance on the property of another, and who fails to do so, will be liable for any damages resulting therefrom."

See also the cases there digested and annotated.

The theory of those cases is that where one undertakes or agrees to procure insurance for another, and then, by reason of his own negligence, fails to procure such insurance, he is liable to the other party for the damages suffered by such other party up to the

limits of the policy which would have been in effect but for his negligence.

This line of cases and this theory was evidently followed by plaintiff in commencing this action and throughout the trial. Plaintiff's complaint is based on two alternative causes of action—one for alleged negligent failure of defendant to perform his alleged agreement to procure insurance for plaintiff, the other for breach of contract in failing to perform such agreement. The language used in alleging both causes of action shows conclusively that plaintiff was relying upon the rule herein mentioned for his recovery. That he pursued the same theory throughout the trial appears from plaintiff's requested instruction number 1 (R 40), which summarizes the theory and cites certain cases which follow that theory.

As will be seen from the excerpt above quoted from A.L.R. and from the cases there annotated, and also from plaintiff's requested instruction, liability of the agent or broker has been based upon the fact that he had undertaken or agreed to procure the insurance in question. Some of the cases go quite far to find an undertaking or agreement, but so far as the writer is aware none of the cases have found the broker or agent liable without finding some existing duty arising by contract, express or implied, to procure such insurance. In most of such cases the premium was paid at the time the agreement was made, but the writer has seen no case where the agent or broker has been held liable where the premium had not been paid or at least arranged.

The trial Court in this action specifically held (R 31, 244) that no agreement had been reached between the parties. A review of the record will demonstrate that that ruling was correct. The entire transaction was by correspondence. Plaintiff's first letter was an inquiry (R 166). Defendant's reply to that first letter answered the inqury and set forth the information that would be required if an application for insurance were made (R 167). Plaintiff's reply to that letter was dated April 17, 1948, and is plaintiff's Exhibit 3 (R 168). It partially furnishes the information requested in defendant's previous letter and ends as follows:

> "I trust this is the complete and necessary description for my insurance application."

It would seem that this letter itself is the application, although no specific request is made of defendant to attempt to procure such insurance. It is interesting to note that while plaintiff at that time knew the amount of insurance desired and the rate of the premium, he didn't send any money, he didn't make any arrangements to pay the premium, he didn't even mention premium.

This letter of application dated April 17 was admittedly lost or mislaid by defendant's employees for a period of over two months. The application or offer was never accepted. It seems clear that there was no agreement or undertaking by defendant to procure the insurance in question.

The trial Court, after holding that there was no agreement between the parties as to procurement of insurance, submitted the matter to the jury on a theory of negligence.

The elements of actionable negligence are set out in American Jurisprudence as follows:

> "The primary wrong upon which a cause of action for negligence is based consists in the breach of a duty on the part of one person to protect another against injury, the proximate result of which is an injury to the person to whom the duty is owed. These elements of duty, breach, and injury are essentials of actionable negligence. In the absence of any of them, no cause of action for negligence will lie."
>
> 38 Am. Jur., Negligence, Section 11, page 651, and cases there cited.

The element of a duty of one party to another in an action for tort based on negligence is discussed in American Jurisprudence as follows:

> "An action to recover damages for an injury sustained by the plaintiff on the theory that they were caused by the negligence of the defendant will not lie unless it appears that there existed, at the time and place where the injury was inflicted, a duty on the part of the defendant and a corresponding right in the plaintiff for the protection of the latter. Negligence exists only with relation to a duty to exercise care. Actionable negligence is based upon the breach of a duty on the part of one person to exercise care to protect another against injury, by failing to perform, or

> in the manner of performing, such duty, as a result of which the latter sustains an injury. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the breach of a duty and a corresponding infringement of the right to be protected in person and in property."
>
> 38 Am. Jur., Negligence, Section 12, page 652, and cases there cited.

See also discussion in American Jurisprudence on necessity of the injury being the result of a breach of duty.

> "Clearly, the occurrence of an injury, without more, does not constitute a case of actionable negligence. A cause of action for negligence depends not only upon the defendant's breach of duty to exercise care to avoid injury to the plaintiff, but also upon an injury suffered by the plaintiff as a consequence of the violation of duty."
>
> 38 Am. Jur., Negligence, Section 27, page 672.

The above quotations are sufficient to illustrate that a party may not recover against another because of negligent acts or omissions of the other unless such other party was under a duty to act or not to act as the case may be.

Generally a person may be under a duty to act or not to act as a result of positive duty imposed by law, either as a result of statute or implication therefrom, or by reason of some special relationship between the parties or by reason of some agreement between the parties.

We have already shown that no agreement existed between the parties as to procuring the insurance in question. It has not been suggested that defendant was under any statutory obligation to act in the matter. As it appears from the record, there was no special relationship between the parties. Plaintiff first made inquiry and then applied for insurance. Defendant answered the inquiry and did nothing more. The parties were dealing at arm's length.

The record in this cause is entirely silent as to any duty of defendant to plaintiff, either by agreement or by operation of law. There is no suggestion made that defendant could not at his pleasure either accept or reject plaintiff's proposal that defendant attempt to secure insurance for plaintiff.

Generally speaking, silence or failure to reject an offer when it is made does not constitute an acceptance of the offer,

12 Am. Jur., Contracts, Section 40, page 533, and cases there cited,

and an offer not accepted or rejected within a reasonable time is considered withdrawn.

12 Am. Jur., Contracts, Section 56, page 547.

The general law above cited is applicable to applications or proposals for insurance, and generally it is held that an insurance company is at liberty to choose its own risks and may accept or reject applicants as it may see fit.

American Life Insurance Co. v. Nabors, Texas, 1934, 124 Texas 221, 76 S.W. (2d) 497, 498.

It is a well-settled rule, established by the great weight of authority, that mere delay in passing on an application for insurance cannot be construed as an acceptance thereof by the insurer which will support an action in contract.

Schleip v. Commercial Casualty Insurance Co., Minnesota, 191 Minn. 479, 254 N.W. 618.

The cases here cited are merely illustrative of the principle involved and numerous other authorities could be cited to the same effect. Of course, it will be recognized that the cases cited involve insurance companies rather than agents or brokers. As has previously been shown, liability of a broker to the prospective insured is dependent upon a contract or agreement between the parties whereby the agent undertook to procure a policy for the prospective insured. Since mere inaction or delay on the part of an insurance company in accepting or rejecting a policy does not create an agreement to insure, it follows as a matter of course that like inaction or delay of an agent or broker in accepting or rejecting an offer that he procure insurance would not constitute an acceptance of the offer.

Plaintiff here tried this action upon the theory that defendant's employees were negligent in misplacing plaintiff's offer or proposal. That may be conceded as true for the purpose of this argument. It doesn't follow that such negligence raised any liability of defendant to plaintiff. The only effect of such negligence, if it was negligence, was that plaintiff's offer wasn't accepted within a reasonable time and

therefore could be considered as being withdrawn. Plaintiff was not bound by his offer at the expiration of a reasonable time after making it. He had a perfect right to apply elsewhere to attempt to get insurance. In fact, he had a positive duty to apply elsewhere if he wanted to attempt to get insurance. If he did not see fit to apply elsewhere, the loss which resulted is his own loss and he should not be allowed to shift the loss which resulted from his own inaction to some other party.

An attempt to allege an action in tort upon the facts shown by this record is an attempt to do by indirection what the law will not allow by direction. Defendant owed no duty at all to plaintiff to either accept or reject plaintiff's application. Inaction by defendant amounted to a rejection of plaintiff's offer. No contract resulted. No duty to act existed. No liability resulted. Whether or not defendant's employees negligently handled plaintiff's letter of application of April 17, 1948, is absolutely immaterial.

Zayc v. John Hancock Mut. Life Ins. Co. of Boston, Mass., Pennsylvania, 338 Penn. 426, 13 Atlantic (2d) 34.

At the close of plaintiff's evidence, the Court had already ruled that no contract existed between the parties. No evidence had been offered to support any contention of any duty existing from defendant to plaintiff. No dispute existed at to any facts concerning liability of defendant to plaintiff. No evidence had been presented concerning which the credibility of witnesses might be involved insofar as liability was

concerned. On the face of the record as presented, and as a matter of law, defendant was not liable to plaintiff. The trial Court should have dismissed the action at that point, or in the alternative should have directed a verdict in favor of defendant, or granted judgment in favor of defendant on defendant's motion. By the same token, the Court should have dismissed the action, or directed a verdict for defendant, or granted judgment for the defendant on his motion made at the close of the entire case. There was nothing to go to the jury. The Court should have held as a matter of law that defendant was not liable to plaintiff in any amount. Having allowed the matter to go to the jury, the Court should have refused to accept the verdict and should have rendered judgment for defendant upon defendant's motion for judgment notwithstanding the verdict.

It is apparent from the record here that plaintiff knew that no insurance policy had been issued. On June 1, 1948, he wrote a letter of inquiry asking whether there "are corrections to be made or what needs to be done." A few days later, and in any event prior to the middle of June, plaintiff received a letter from defendant in reply, which on the face of it showed that defendant believed he had not received an answer to his first letter dated April 9 and again asking for information as requested in that letter (R. 171; R. 238). Plaintiff on receiving that letter could have furnished the information or he could have gone elsewhere to seek insurance. If he saw fit to drop the matter, his loss, as a matter of law, is the proxi-

mate result of his own failure to act, not the proximate result of any negligence of defendant in mislaying the previous letter of April 17. The jury, on the evidence presented, could not properly find that plaintiff's loss was the proximate result of any negligence of defendant. The Court on that ground as well should have granted defendant's motions and taken the case from the jury and entered judgment for defendant.

Rule 50 of the Federal Rules of Civil Procedure provides as follows:

MOTION FOR A DIRECTED VERDICT

"(a) WHEN MADE: EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

"(b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have

judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Under the rule the trial Court should have entered judgment for the defendant. This Court, on reviewing the record, should reverse the trial Court with directions to the trial Court to enter judgment for defendant.

Eastern Livestock Cooperative Marketing Association v. Dickenson (C.C.A. 4), 107 F. (2d) 116;

Massachusetts Protective Assn., Inc. v. Mouber (C.C.A. 8), 110 F. (2d) 203;

U. S. v. Halliday (C.C.A. 4), 116 F. (2d) 812.

"When on the trial of the issues of fact in an action at law before a federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a

verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Gunning v. Cooley, 281 U. S. 90;

Indemnity Insurance Co. of North America v. Atchison, T. & S.F. Ry. Co. (C.C.A. 9), 85 F. (2d) 438.

Defendant has always maintained and still maintains that he is not liable to plaintiff at all. However, for the purpose of this argument, and for that purpose alone, defendant submits that there is in the record no satisfactory evidence of plaintiff's loss or the amount thereof. As to the building, it is purely speculative as to whether plaintiff had any interest therein except bare occupancy. The facts certainly are in plaintiff's knowledge and the knowledge of his witnesses and of witnesses he could have produced. The burden is upon plaintiff to prove his damages as well as the other material allegations of his complaint. Instead of proving that he had some insurable interest in the building, he and his witnesses evaded the issue at every turn. The best that can be made from the

evidence is that plaintiff purchased the building from the former United States Commissioner for a sum of twelve hundred dollars, of which an unspecified amount was paid and the rest cancelled. It seems quite likely that the building belonged to a deceased person whose estate had not been probated. If that were not true, plaintiff could certainly have produced testimony to rebut the evidence of defendant's witness, Cuddy, on that point. The only evidence he offered on that point is found in the direct examination of plaintiff's witness, Smith, at page 317 of the record.

> Question by Mr. Nesbett, plaintiff's attorney:
> "And do you know whether or not the Heinz Smchook Estate had any interest in this property which later became Tony's?"
>
> Answer:
> "I don't know positively."

Certainly it would seem likely that the witness at least had a very strong suspicion that the building did belong to the Estate of Heinz Smchook and not to the plaintiff at all.

Several witnesses testified that plaintiff improved the building. It would seem that if in fact he improved someone else's building that he has no claim for loss of such improvements. In any event no testimony was offered as to the value of either the labor or materials that went into improving the building (R. 221).

It appears from the record that plaintiff wanted all three buildings insured together for $6,000. Only one

building burned. There is no evidence in the record at all concerning the value of the buildings which didn't burn.

Plaintiff had some equipment in the building. Whether it was still there when the building burned is not known. At least two weeks elapsed after Ruhl left and before the building burned. In testifying as to the equipment and as to the inventory and stock, the witnesses were handed the bill of particulars furnished by plaintiff just before trial. Who made up that bill of particulars or from what it was made isn't clear. Certainly it was not identified as an exhibit. The best that can be made from the testimony is that each of the witnesses knew some of the equipment was in the place at some time, but no one knows what was there at the time of the fire. It is entirely possible that all equipment and stock was removed before the fire. According to the application, the light plant was in a separate building which didn't burn. Now it is claimed the light plant was on the porch of the main building. It is an even bet that gasoline or waste from such engine caused the fire, but of course there is no evidence on that. However, it seems questionable, at best, as to whether a policy, if issued, would have covered the value of that light plant at a location in the main building. The value of that light plant is lumped in plaintiff's claimed loss.

There is no real evidence as to what merchandise or stock Polimeni ever had. The inventory on the bill of particulars was never explained as to where and how and from what information it was compiled. It seems

probable that at least a large part of plaintiff's supplies were used by Ruhl after plaintiff left the place. In any event, no one testified that the merchandise listed on the bill of particulars was in the place when it burned. It is entirely possible it had been removed before the fire.

Certainly plaintiff could have produced real evidence as to what he lost and its value. It seems to the writer that the only possible reason for his refusal to produce inventories, and to produce as witnesses persons who knew the facts, and for his evasions when defendant attempted to learn these values, is because he knew that his real loss was only a fraction of his claimed loss.

The state of the record as to proof of damage is such that there was no substantial evidence as to the amount of plaintiff's loss, if any. Under the record the jury could do nothing except to speculate as to the amount of plaintiff's loss, if any.

The Court should have directed a verdict for the defendant on the ground that plaintiff had not proved his damages. It is apparent from the record that there is no evidence to support a verdict for $9,200. There is no possible formula by which that figure could have been reached under the evidence introduced.

Having allowed the matter to go to the jury, the trial Court should have granted defendant's motion for new trial for the reason that the verdict is certainly not supported by the evidence as to the amount

of damage, if for no other reason. Appellant believes the trial Court abused its discretion by failing to grant such motion.

Motion for new trial is not waived by motion for judgment, nothwithstanding the verdict or the action of the Court thereon.

Montgomery Ward and Company v. Duncan, 311 U.S. 243.

Appellant respectfully submits that for the reasons here shown that there is no liability of defendant to plaintiff and that the trial Court committed substantial error prejudicial to appellant in denying motions made by appellant as defendant as herein set out, and in submitting the matter to the jury, and in accepting the verdict and entering judgment for plaintiff and against defendant, and in failing to vacate the verdict and judgment, and in failing to enter judgment for defendant, or in the alternative, in refusing to grant a new trial.

Appellant respectfully submits that the action of the trial Court should be reversed and that the trial Court should be directed to enter judgment for the defendant.

Dated, Anchorage, Alaska,
January 19, 1951.

Respectfully submitted,
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By EDWARD V. DAVIS,
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